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No. 82-337

In the Supreme Court of the United States

OCTOBER TERM, 1982

CAESAR FERRETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government's inadvertent failure to produce all of the materials used in testing a substance for the presence of illegal drugs required the district court to impose sanctions under Fed. R. Crim. P. 16.

2. Whether the failure to obtain and preserve notes independently prepared by a witness for use at petitioner's first trial violates any duty of the government.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 43-45) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1982. A petition for rehearing was denied on July 12, 1982. The petition for a writ of certiorari was filed on August 26, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on two counts of distributing methamphetamine, in violation of 21 U.S.C. 841(a)(1). He was sentenced to consecutive four year terms of imprisonment and a two year special parole term. The court of appeals affirmed.

1. In March 1979 petitioner was convicted on two counts of distributing methamphetamine in violation of 21 U.S.C 841(a)(1). On appeal, the Third Circuit vacated the convictions on procedural grounds and remanded the case for a new trial. 635 F.2d 1089 (1980). Contrary to a local rule, the district court had permitted the prosecution to reply to the closing argument of the defense. See Rule 29.1, Fed. R. Crim. P. The district court mistakenly believed that the local rule had been repealed in light of Fed. R. Crim. P. 29.1.

On remand petitioner was again convicted of distributing methamphetamine in violation of 21 U.S.C. 841(a)(1). The issues petitioner raises in this Court all relate to his convictions after his second trial.

2. The underlying facts are adequately stated in the court of appeals' first opinion in this case. 635 F.2d at 1090. In early 1978 William Kean, a Drug Enforcement Administration (DEA) agent, spoke with Michael Marrazzo, who was then on parole following a conviction for manufacturing and distributing methamphetamine. Kean apparently secured Marrazzo's assistance as an informant by assuring him that he would not be prosecuted for certain crimes that Kean was aware of. See Tr. 286-290, 297, 351-353.[1] Kean and Marrazzo began an investigation of petitioner, with whom Marrazzo had associated in the past. On May 4, 1978, Marrazzo went to petitioner's home, where petitioner gave him a .59-gram sample of methamphetamine. Marrazzo delivered the sample to Kean. See Tr. 171-174, 254-264. A

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[1]"Tr." refers to the transcript of petitioner's second trial.

week later, Marrazzo met petitioner again. This time petitioner gave Marrazzo approximately an ounce of methamphetamine, for which Marrazzo agreed to pay $650. Marrazzo delivered the substance to Kean. See Tr. 174-176, 264-271.

ARGUMENT

1. Petitioner contends (Pet. 19-28) that the district court abused its discretion in declining to impose sanctions against the government pursuant to Fed. R. Crim. P. 16(d) for failure to produce the "standard" methamphetamine spectrum used in identifying the substances petitioner gave to Marrazzo. Resolution of that question necessarily depends on the particular facts of this case. Review in this Court is therefore unwarranted. In any event, petitioner's argument is without merit.

Under Fed. R. Crim. P. 16(a)(1)(D), a criminal defendant is entitled to inspect and copy the "results or reports * * * of scientific tests or experiments" that are within the control of the government and material to the defense. The rule does not, however, require production of any underlying data. Although petitioner requested production of far more than he was entitled to under Rule 16, the discovery agreement negotiated with the government and incorporated in the district court's order tracks Rule 16.[2] The "Memorandum of Areas of Agreement and Disagreement Concerning Defendant's Motion for Discovery and Inspection" provides (A. 35a) in pertinent part as follows (emphasis added):

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[2]Petitioner requested (A. 19a) production of "[a]ny and all graphs, charts, scientific treatises and other documents prepared by and/or referred to by any expert witness in the performance of any scientific tests, the results of which will or may be referred to in the testimony of any government witness."

"A." refers to the appendix filed in the court of appeals.

> [T]he government agrees to supply the *results of and any records of*, including charts and graphs, *scientific tests performed by the chemists* * * * to the extent that they are available.

The district court's discovery order did not modify the scope of the agreement on this point. See A. 37a-44a.

To identify the substances petitioner had given Marrazzo, Maria Barba, a DEA chemist, prepared an infrared spectrum for each of the substances and compared it to a "standard" infrared spectrum of methamphetamine. A. 418a-419a.[3] On the basis of these comparisons, Barba concluded that the substances petitioner had given Marrazzo contained methamphetamine. A. 405a, 409a. Barba's file in this case was turned over to petitioner (see A. 412a, 501a), but it did not include any standard methamphetamine spectrum. Because of the omission, petitioner moved (A. 424a-425a) to strike Barba's testimony and later (A. 540a-545a) moved for a judgment of acquittal on the ground that without Barba's testimony, which he claimed should have been stricken, there was insufficient evidence that the substances given to Marrazzo were methamphetamine.

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[3]The record is ambiguous as to whether Barba prepared a "standard" methamphetamine spectrum specifically for this case or used a published standard or a standard prepared in some other case. See A. 404a-405a, 409a, 419a-420a; see also A. 523a. But compare A. 497a, 522a. If Barba did not prepare a standard spectrum for this case, the published or general standard used plainly would not be subject to discovery. Cf. *United States* v. *Orzechowski*, 547 F.2d 978 (7th Cir. 1976), cert. denied, 431 U.S. 906 (1977) (discovery order does not require production of internal DEA memoranda relating to tests necessary to determine whether a substance is cocaine because the memoranda were general and not prepared in connection with any particular prosecution). It would, of course, be a proper subject for cross-examination, but that is not the issue here.

The district court reasonably declined to exercise its discretion to sanction the government pursuant to Fed. R. Crim. P. 16(d)(2) and, therefore, correctly denied both motions.[4] While an infrared spectrum may be referred to as a "graph" (see A. 416a-417a), it is doubtful that it can be fairly characterized as a result, report, or record of a scientific test, within the meaning of either Fed. R. Crim. P. 16(a)(1)(D) or the discovery agreement. Assuming that Barba prepared a standard methamphetamine spectrum, the district court could reasonably have concluded that the standard was closer to a piece of equipment or a reference work than a report or record of a test and, therefore, not subject to discovery. At the very least, the district court could have concluded that such a dubious violation of Rule 16 and the discovery agreement provided insufficient basis, under the circumstances of this case, for imposing the severe sanctions sought by petitioner.

Before petitioner's first trial, Barba moved to Germany. See 635 F.2d at 1094. For the retrial, however, Barba was brought from Germany to testify. The prosecutor asked Barba and another chemist who had analyzed the substances to bring to court "their charts and whatever results, any papers, figures and stuff that they used * * *" (A. 422a-423a). The prosecutor did not specifically ask that the chemists bring any standard methamphetamine spectrum they might have used because he was not familiar with the process used to identify methamphetamine. A. 423a. Barba

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[4]Fed. R. Crim. P. 16(d)(2) provides in pertinent part as follows: "If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances."

brought her file to court and, as noted, it was disclosed to petitioner.[5] Given petitioner's general and ambiguous discovery request, the prosecutor's good faith effort to comply militates against imposing sanctions for any violation of the rule or agreement. Petitioner complains (Pet. 24-25) that the government did not seek a continuance to secure the standard methamphetamine spectrum, but that course was equally available to petitioner, and he failed to suggest it.[6] Under the circumstances of this case, the court's refusal to impose sanctions was amply justified.[7]

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[5]We are advised by the former Assistant United States Attorney who tried petitioner that Barba's file was not sought or disclosed in connection with petitioner's first trial.

[6]Furthermore, it is doubtful that the failure to provide the standard prejudiced petitioner. We are advised by the former Assistant United States Attorney that no question as to any standard methamphetamine spectrum was raised at the first trial, although the standard used by the chemist who testified at that trial was not produced. Nor did petitioner ever seek access to the substances for purposes of performing his own tests. Finally, while petitioner unsuccessfully attempted to have Barba's testimony struck because of the failure to produce the standard, petitioner made no further efforts to secure the standard. Indeed, after ascertaining that Barba did not have the standard in court, petitioner made no attempt to determine whether the standard she used could be obtained. Petitioner's trial strategy therefore appears to have been based on the assumption that he would benefit more from the absence of the standard than from its presence.

[7]Nothing in either *Brady* v. *Maryland*, 373 U.S. 83 (1963), or *United States* v. *Agurs*, 427 U.S. 97 (1976), creates a presumption that information not disclosed is favorable to the defendant and material. Until the standard methamphetamine spectrum that Barba used is examined, therefore, petitioner's *Brady* claim is (at best) premature.

As petitioner acknowledges (Pet. 29), "the government * * * did not assert that the [standard methamphetamine spectrum was] * * * lost or unavailable * * *." Thus, the cases cited at Pet. 28-29 discussing the government's obligation to adopt procedures to preserve evidence are irrelevant.

2. Petitioner next contends that the district court erred in refusing to strike Marrazzo's testimony because the government failed to preserve the notes Marrazzo had used in testifying at petitioner's first trial. That claim is frivolous because (1) the government never received the notes; (2) petitioner reviewed the notes at his first trial; and (3) petitioner had the transcript of Marrazzo's testimony at the first trial available for cross-examination at the second trial.

During his testimony at the second trial, Marrazzo took out a sheet of paper (Tr. 247) to which he referred in the course of his testimony (Tr. 247, 264-265). On cross-examination, Marrazzo explained that he had written notes concerning the two 1978 drug transactions with petitioner shortly before the second trial. He also used notes during his testimony at petitioner's first trial, but he destroyed those notes at some point after petitioner's first conviction (Tr. 303-307, 308-310). At a bench conference, the government advised the court that Marrazzo had shown his notes to petitioner's attorney at the first trial. Petitioner did not request a copy of the notes at that time. The government never received a copy of the notes.

Petitioner moved to strike Marrazzo's testimony on the ground that the government's failure to produce Marrazzo's notes violated the Jencks Act. Petitioner admitted that he had seen the notes at the prior trial and remarked that there were variances between the notes Marrazzo had used at the first trial and the notes that he brought with him to the second trial. The district court correctly denied petitioner's motion (Tr. 313-323).

The prosecutor did not dispute (A. 288a) that Marrazzo's handwritten notes describing the substance of his testimony at the first trial constituted a "statement" within the meaning of the Jencks Act. Nonetheless, it is clear that the government produced all statements written by Marrazzo

that were within its possession, custody, or control. The government never had custody or control over the notes and was not obliged to obtain and preserve them for petitioner's use at any subsequent trial. See *United States* v. *Hutcher*, 622 F.2d 1083, 1088 (2d Cir.), cert. denied, 449 U.S. 875 (1980) (failure to provide a transcript of a witness' testimony from a prior proceeding did not violate the Jencks Act because the transcript was available from the court and not in the prosecutor's possession, custody, or control).[8]

In any event, any error in the government's failure to obtain and preserve a copy of the notes was plainly harmless. See *United States* v. *Surface*, 624 F.2d 23, 26 (5th Cir. 1980) (harmless error where no material difference between typewritten statement and undisclosed handwritten notes).[9] Marrazzo showed his notes to petitioner's attorney at the first trial, so petitioner had an opportunity to use the notes for impeachment at that time. Moreover, petitioner used the transcript of Marrazzo's testimony at the first trial (which, of course, was based on Marrazzo's notes) for cross-examination during the retrial (see Tr. 349-351). Finally, petitioner's counsel admitted that he remembered some of the information in Marrazzo's first set of notes (see Tr. 321-322). Under these circumstances, it is clear that there was no reversible error.

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[8]For the same reason, petitioner's reliance (Pet. 37-38) on *Brady* v. *Maryland*, *supra*; *United States* v. *Bryant*, 439 F.2d 642 (D.C. Cir. 1971), and similar cases is completely misplaced. Those cases do not impose any duty on the government *to secure* evidence that might be discoverable.

[9]Contrary to petitioner's apparent contention (Pet. 38-39), Fed. R. Crim. P. 52(a) is applicable to Jencks Act violations. See *Goldberg* v. *United States*, 425 U.S. 94, 111 n.21 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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